

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE RAY MCCLURE,

Defendant-Appellant.

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UNPUBLISHED

November 13, 2008

No. 281338

Genesee Circuit Court

LC No. 07-020073-FC

Before: Beckering, P.J. and Borrello and Davis, JJ.

PER CURIAM.

Defendant, via appointed counsel and acting *in propria persona*, appeals as of right his convictions of and sentences for his jury convictions of felon in possession of a firearm 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 60 to 90 months for CCW and felon in possession, and to a consecutive two-year term for felony-firearm. We affirm.

Defendant was charged with the above offenses, and with open murder, MCL 750.318, in the shooting death of Tyrone Savage-Poplar. He was acquitted of the murder charge.

I. Probable cause

Defendant first argues that no probable cause existed to issue a warrant against him for the murder of Savage-Poplar, and that “the fruit of this poisonous tree was defendant being convicted unjustly of the three weapon charges.” However, even if the arrest warrant was defective, it did not divest the trial court of jurisdiction to try the offenses, because jurisdiction was acquired over defendant after he was properly bound over to the trial court following the preliminary examination in the district court. See *People v Burrill*, 391 Mich 124, 127-128, 132-134; 214 NW2d 823 (1974). In addition, the statements of eyewitness Kivondi Lewis supported a finding of probable cause that defendant committed the killing, and supported a finding of probable cause as to the concurrent charge of felon in possession. Defendant is not entitled to relief based on this issue.

II. Suppression of preliminary examination testimony

Defendant argues that the trial court abused its discretion when it denied defendant's motion for an evidentiary hearing and denied the motion to suppress the preliminary examination statement of Kivondi Lewis, who defendant asserts committed perjury under oath. Defendant points to the inconsistencies between Lewis' preliminary examination testimony and his initial statement to police officers in a videotaped interview as support for his argument. Notably, Lewis testified at the preliminary examination that he had seen defendant shoot Savage-Poplar, but had allegedly earlier told the police that he did not witness the shooting itself. However, defendant presents no authority to support his position that these inconsistencies should have caused the trial court to suppress Lewis' preliminary examination testimony and to dismiss the charges against him. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

### III. Insufficient evidence

Defendant argues that the prosecutor presented insufficient evidence to support his convictions. We disagree.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant's discharge from probation. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004); MCL 750.224f.<sup>1</sup> To establish the offense of carrying a concealed weapon, the prosecution must prove the defendant knowingly possessed a concealed weapon. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. Possession may be actual or constructive, and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). A defendant has constructive possession of a weapon "if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471.

The prosecution presented sufficient evidence to allow the jury to find defendant guilty of CCW, felon in possession, and felony-firearm. Lewis was present in the car when Savage-Poplar was shot. As the two pulled up to a corner, Lewis saw defendant pull out a handgun from an inside pocket of his coat. Defendant walked to the driver's side of the car, pointed the gun toward the driver's window, and started shooting.

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<sup>1</sup> The parties stipulated to elements two and three.

Lewis's testimony, if believed by the jury, supported the jury's decision that defendant was guilty of CCW, felon and possession, and felony-firearm. Defendant argues that the jury must have been confused, because it did not believe Lewis's statement that defendant shot Savage-Poplar, but still found him guilty of the related weapon charges. We disagree. A jury is free to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). The jury could well have chosen to believe Lewis's testimony that defendant possessed a weapon, and concealed it, while still finding a reasonable doubt that defendant was the individual who actually shot Savage-Poplar.

#### IV. Prosecutor misconduct

Defendant argues that the prosecutor committed misconduct when she failed to inform defendant about the substance of the testimony of another prosecution witness, Delon Savage. According to defendant, in response to a discovery demand, the prosecution responded that it intended to call Mr. Savage only if it were necessary for him to testify as to the identification of the deceased.<sup>2</sup> However, at trial, Savage testified that Lewis came to his home and told him that defendant killed Savage-Poplar. Defendant maintains that the prosecutor improperly withheld exculpatory evidence. We disagree.

Although there is no general constitutional right to discovery in a criminal case, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), a defendant does have a due process right to exculpatory information possessed by the prosecution, *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Savage's testimony was not exculpatory, but inculpatory. Defendant has not shown that the prosecutor deliberately committed misconduct.

#### V. Ineffective assistance of counsel

Defendant maintains that trial counsel provided ineffective assistance when he failed to support defendant's pro per motion for an evidentiary hearing "which would have allowed a full factual determination of whether evidence existed to convict defendant of the weapons charges", and his pro per motion to suppress Lewis' preliminary examination testimony. We disagree.

Defendant did not move for a new trial or a *Ginther*<sup>3</sup> hearing before the trial court; therefore, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

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<sup>2</sup> Defendant has provided nothing to support this assertion.

<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

Contrary to defendant’s contention, trial counsel presented defendant’s numerous pre-trial motions to the trial court after the court held that it would not entertain pro per motions while defendant was represented by counsel. While defendant now maintains that it was his lack of training in the law that caused the trial court to deny his relief, this is not the case. The issues defendant raised, which mirror those he has raised here, were instead found by the trial court to be without merit. As discussed above, defendant has not shown that the trial court erred in its decisions. Therefore, defendant has not established ineffective assistance.

Defendant also raises a related claim that the trial court should have removed trial counsel when counsel allegedly “begged” to be allowed to withdraw from the case. However, we note that trial counsel was retained, not appointed. This claim is without merit.

#### VI. Instructional errors

Defendant also argues that the trial court abused its discretion when it “failed to properly instruct the jury concerning the weapons charges and denied defendant’s motion to dismiss, and allowed the jury to make an inconsistent verdict finding defendant guilty of the weapons charges.” Defendant asserts that he could not be convicted of felon in possession, CCW, and felony-firearm when he was acquitted of the “predicate offense” of open murder. We disagree.

Our Supreme Court has held that juries may return inconsistent verdicts. *People v Lewis*, 415 Mich 443, 448; 453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). “A jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses.” *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). Inconsistent verdicts may require reversal when there is evidence, beyond the inconsistent verdict itself, “that the jury was confused, did not understand the instructions, or did not know what it was doing.” *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). See also *Lewis, supra* at 450 n 9. Conversely, when a jury chooses not to convict because it has chosen to be lenient, the defendant “has no cause for complaint.” *Lewis, supra* at 453.

Defendant has offered nothing on appeal other than the verdict itself to demonstrate that the jury was confused or engaged in impermissible compromise requiring a new trial. Moreover, given Lewis’s testimony, the verdicts were not necessarily inconsistent.

We also find that the trial court’s jury instructions on this point were appropriate and accurate. Furthermore, because the jury verdict was not improper, the trial court did not err when it denied defendant’s pro per motion for a directed verdict.

## VII. Sentencing Issues

Defendant argues that, because he was acquitted of murder and because CCW is a victimless crime, the trial court erred when it allowed members of Savage-Poplar's family to address the court prior to sentencing, because the family members had no standing under the crime victim's rights act, MCL 780.752. We disagree.

Pursuant to MCR 6.425(E)(1)(c), the trial court is required to allow only "the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity" to speak at the sentencing hearing. However, the court may, in its discretion, allow other parties to speak. *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994); *People v Lawson*, 172 Mich App 498, 500-501; 432 NW2d 354 (1988). "Michigan's sentencing system promotes informed, conscientious decision making by providing the parties an almost unlimited opportunity to submit pertinent information before sentencing." *People v Wybrecht*, 222 Mich App 160, 171; 564 NW2d 903 (1997). Here, Savage-Poplar's family members were provided an opportunity to express their grief, and obviously they thought that defendant was guilty of the killing. However, the trial court repeatedly acknowledged that the jury had acquitted defendant of this crime. Defendant has not shown that the trial court was biased or prejudiced as a result of the statements made by the family members. We find that the trial court's decision was within the range of principled outcomes, and therefore did not constitute an abuse of discretion.

Defendant also argues that the trial court did not have substantial and compelling reasons to exceed the sentencing guidelines. A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 263 n 20, 264.

In reviewing a departure from the guidelines, the existence of a particular factor is a factual determination reviewed for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *Abramski*, *supra* at 74. In ascertaining whether the departure was proper, we defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

The trial court stated that it departed from the guidelines because the guidelines did not contemplate defendant's juvenile history of absconding from supervision, his adult probation violations, and the fact that, after a probation violation, defendant "maxed out" his sentence,

which to the court meant that defendant had received numerous tickets and misconducts while in prison. The trial court also relied heavily on defendant's total lack of remorse.<sup>4</sup>

On appeal, defendant does not challenge the trial court's use of his prior criminal history and misconduct in prison as reasons for departure, but rather argues that a lack of remorse is a subjective factor, which cannot be used as a factor to justify a departure. Defendant's argument is generally correct. See *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000). Here, however, defendant's callous comments during sentencing showed an objective manifestation of his obvious lack of remorse. A sentencing court "may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation." *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). It is clear from defendant's comments that he felt Savage-Poplar had earned the fate that befell him, apparently due to Savage-Poplar's role in the death of one of defendant's friends. Defendant's lack of remorse was not accounted for in the guidelines, and was is a factor that cast further doubt on his desire and potential for rehabilitation. The trial court did not err in finding it substantial and compelling.

We find that the trial court's reasons for departure were appropriate. In addition, defendant's sentences were appropriate given the circumstances of the offense and the offender.

Defendant also argues that the trial court inappropriately used evidence not in the record and inaccurate information during sentencing. He maintains that, because his major misconducts were listed in the presentence information report, the trial court's comment that "there were tickets and misconducts all over the place which the guidelines don't know about" shows that the trial court relied on evidence not contained in the record. Defendant is mistaken in his analysis of the trial court's comments and the import of the contents of the report. The trial court's statement that the guidelines did not take defendant's prison misconducts into account was accurate.

Defendant also argues that the trial court erroneously found that defendant had violated probation as an adult. However, the presentence investigation report supports this finding.

Defendant also maintains that the trial court improperly placed words in his mouth when the court noted that "[defendant stands] here today and say it doesn't matter because somebody else got killed." Defendant correctly notes that he did not use this exact phrasing during his diatribe. However, this was an appropriate paraphrasing of defendant's absolute lack of remorse and his comments during sentencing.

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<sup>4</sup> Defendant contends that the trial court also improperly relied on the fact that it was "unable" to sentence defendant as a murderer as a reason for departure. During sentencing, the trial court observed, "I cannot sentence Mr. McClure as a murderer because the jury acquitted him of that." However, we read this comment as an appropriate recognition that it would be improper to punish defendant for a crime of which he had been acquitted, not a rationale for exceeding the guidelines that the trial court had ruled could not take the killing into account. Defendant has not shown that the trial court improperly exceeded the guidelines because it believed defendant to be guilty of murder.

Defendant also maintains that, because he was acquitted of the felony that formed the basis for the felony-firearm charge, consecutive sentencing was inappropriate. However, the information for this case listed both open murder and felon in possession as predicate offenses for defendant's felony-firearm charge. Because defendant was convicted of felon in possession, consecutive sentencing was appropriate.

Defendant further appears to maintain that trial counsel was ineffective for failing to support him in his quest to have his sentence vacated because the trial court relied on inaccurate information. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

#### VIII. Ineffective assistance of appellate counsel

Finally, defendant argues that appellate counsel rendered ineffective assistance by failing to raise the issues defendant has raised in his supplemental brief. However, we find that these issues are without merit; therefore, appellate counsel was not ineffective for failing to pursue them. *Id.* Defendant has failed to provide any support for his concurrent argument that counsel provided ineffective assistance by refusing to provide free transcripts to defendant, and thus has abandoned this issue on appeal. *Wilson, supra* at 243; *Mitcham, supra* at 203.

Affirmed.

/s/ Jane M. Beckering  
/s/ Stephen L. Borrello  
/s/ Alton T. Davis